

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Connect America Fund)	WC Docket No. 10-90
)	
A National Broadband Plan for Our Future)	GN Docket No. 09-51
)	
Establishing Just and Reasonable Rates for Local Exchange Carriers)	WC Docket No. 07-135
)	
High-Cost Universal Service Support)	WC Docket No. 05-337
)	
Developing an Unified Intercarrier Compensation Regime)	CC Docket No. 01-92
)	
Federal-State Joint Board on Universal Service)	CC Docket No. 96-45
)	
Lifeline and Link-Up)	WC Docket No. 03-109

REPLY OF VIASAT, INC.

ViaSat, Inc. (“ViaSat”) replies to those parties that oppose the petition for reconsideration filed by ViaSat on December 29, 2012 in this proceeding (the “Petition”).

ViaSat’s Petition challenges certain aspects of the *Report and Order* adopted by the Commission on October 27, 2011 (the “*CAF Order*”), and asks the Commission to reconsider its approach to the CAF accordingly.¹ For the reasons set forth herein and in ViaSat’s Petition itself, the record supports each of the changes sought in the Petition.

As an initial matter, ViaSat notes that critical elements of the Petition remain unopposed. Most significantly, no party objects to ViaSat’s request that the Commission reconsider its decision to abandon the use of market-based reverse auctions, as proposed in the *Notice of Proposed Rulemaking* in this proceeding, and instead divert the lion’s share of

¹ See 47 C.F.R. § 1.429.

CAF funds to incumbents.² In addition, no party objects to requests that the Commission: (i) reconsider its suggestion that it would not consider the presence of satellite service in determining whether to waive ILEC performance goals and requirements; and (ii) reconsider its decision to consider the “reasonable comparability” of usage *limits* and consider instead the reasonable comparability of broadband *access* in general (which would be more consistent with the objectives of Section 254). This silence speaks volumes, and provides a firm basis for Commission action in these areas consistent with ViaSat’s Petition.

While other portions of ViaSat’s Petition have been opposed, such opposition is unconvincing. In particular: (i) a number of incumbent interests oppose ViaSat’s request that the Commission reconsider its decision to exclude satellite broadband providers *a priori* from the definition of “unsubsidized competitor”—but fail to explain why the Commission can or should discriminate against satellite providers as a class; (ii) ITTA and USTelecom oppose ViaSat’s request that the Commission implement greater accountability measures *now*, before distributing CAF support—but fail to explain why incumbents should not be held accountable where they risk public money unreasonably; (iii) USTelecom opposes ViaSat’s request that the Commission accelerate the timetable for implementation of the Remote Areas Fund—but fails to explain why service to remote areas, which is most central to the core objectives of Section 254(b)(3), should be *de*-prioritized; and (iv) NASUCA requests that the Commission stay any consideration of ViaSat’s Petition until after pending judicial appeals have been resolved—but fails to justify any such abdication of the Commission’s traditional role as expert policymaker. ViaSat takes this opportunity to respond accordingly.

² ViaSat’s Petition demonstrated that incumbents would not be “uniquely” situated to extend broadband service to “unserved” areas quickly and efficiently, and in fact would take longer to provide service that would be more costly and lower-quality in many cases.

I. THE RECORD SUPPORTS VIASAT’S REQUEST THAT SATELLITE BROADBAND PROVIDERS BE INCLUDED IN THE DEFINITION OF “UNSUBSIDIZED COMPETITOR”

The *CAF Order* provides that a recipient of CAF support may not spend funds to serve customers in areas already served by an “unsubsidized competitor,” defined to include any “facilities-based provider of residential terrestrial fixed voice and broadband service.”³ At the same time, the *CAF Order* deliberately and categorically excludes satellite providers from the definition of “unsubsidized competitor” on an *a priori* basis.⁴ ViaSat’s Petition demonstrated that such exclusion was discriminatory and unjustified, as: (i) ample evidence exists that satellite broadband providers are capable of providing affordable voice and broadband service that meets the Commission’s performance requirements—even without the aid of a subsidy; (ii) if satellite providers could not meet such performance requirements, they would not qualify as “unsubsidized competitors” by virtue of that failure (rendering an additional *a priori* exclusion unnecessary); and (iii) the administrative burden of determining whether a satellite broadband provider meets the Commission’s performance requirements would be no greater than—and actually could be less than—that of determining whether a terrestrial provider meets those requirements. The record supports this position.⁵

Unsurprisingly, incumbent interests oppose ViaSat’s request, which would expand the definition of “unsubsidized competitor” and potentially deny those incumbents support in a greater number of cases.⁶ These parties repeat the oft-told tale that satellite broadband service is inferior and should be excluded on that basis. As ViaSat has explained, repeatedly, these criticisms simply are not true, and reflect backward-looking appraisals of

³ *CAF Order* ¶ 103.

⁴ *Id.*

⁵ See Comments of AT&T at 34-35, NCTA at 17-18, and WISPA at 6-7.

⁶ See Comments of NECA at 6-9, Windstream at 11-13, CenturyLink at 4-5, and Frontier at 6-7.

prior-generation networks, rather than current appraisals of present-generation satellite networks.

Satellite providers have invested billions of dollars of private capital to develop state-of-the-art broadband networks that are designed to overcome the capacity limitations of legacy satellite networks, and are optimized to provide a broadband experience on par with many terrestrial solutions. These efforts are now bearing fruit with the recent launch of the ViaSat-1 satellite, which is driving a quantum shift in the speed and quality of satellite broadband service, while simultaneously increasing available capacity and ultimately allowing satellite broadband providers to serve millions of additional customers.

In short, satellite broadband providers are able to meet any truly technology-neutral performance requirements that apply to terrestrial providers under the *CAF Order*. That being the case, there is only one plausible explanation for incumbent interests to oppose ViaSat's request: they fear that satellite broadband providers *would* meet applicable performance requirement—and thus qualify as “unsubsidized competitors” and deny CAF support to ILECs in the same service area—absent a targeted exclusion. In doing so, satellite broadband would actually advance another important Commission goal: reducing the size of the CAF, and accelerating the transition away from subsidized service. Commission policy should not be shaped by a desire to protect incumbents, but rather must be focused on the need to facilitate the growth of sustainable competition in rural and high-cost areas.

II. THE RECORD SUPPORTS VIASAT'S REQUEST THAT THE COMMISSION IMPLEMENT STRONG ACCOUNTABILITY MEASURES NOW

ViaSat's Petition urged the Commission to reconsider the *CAF Order* by implementing strong accountability measures now, prior to allowing ILECs to make any “statewide commitment” to receive CAF funds on a preferential basis. As ViaSat explained, suitable accountability measures would ensure that incumbents internalize the full risk and costs of possible non-compliance before making any “statewide commitment,” such that they

would have incentives to decline funding where they are not in a position to extend quality broadband service to “unserved” households expeditiously. Thus, ViaSat requested that the Commission:

- Require all price cap ILECs to post a performance bond for each state in which they make a “statewide commitment” to receive support, which could be proportionately reduced whenever a relevant milestone is met (similar to the treatment of milestones in the satellite licensing context⁷);
- Make clear that no support will be awarded for “partial” build-out, since this would reward ILECs that provide substandard service and leave the “unserved” problem unsolved;
- Require price cap ILECs that make a “statewide commitment” but fail to meet milestones to return any funds that they have received to date; and
- Debar price cap ILECs that make a “statewide commitment” but fail to meet milestones from receiving additional funds for a period of time.

ITTA and USTelecom oppose ViaSat’s request for greater accountability.

These parties claim that such accountability measures are unnecessary, and that the Commission instead should rely on its enforcement authority.⁸ The Commission should view such arguments with skepticism, because support recipients—and particularly ILECs—have an obvious interest in avoiding accountability. The fact remains that, while ViaSat supports the Commission’s tireless efforts to enforce its rules, such efforts are unlikely to create the proper incentives in the CAF context for a number of reasons:

- **First**, it is not clear that an ILEC that elects to receive support but fails to use that support effectively necessarily would have broken any rules or otherwise subjected itself to meaningful enforcement. Notably, the Commission’s

⁷ USTelecom asserts that performance bonds are inappropriate here because, unlike in the satellite context, there is no danger of “spectrum warehousing.” See Comments of USTelecom at 9. This failure of lateral thinking is revealing. Of course, ViaSat was not suggesting that the same *policy* concerns are present in the satellite and CAF contexts—merely that the success of performance bonds in creating appropriate incentives in the satellite context indicates that bonds could be used to create similar incentives (albeit in the service of other policy goals, such as resource efficiency) in the CAF context.

⁸ *Id.* at 8-9. See also Comments of ITTA 5-6.

recourse where a licensee fails to meet a construction milestone is to cancel the underlying authorization—not to fine the licensee.

- **Second**, the threat of *potential* enforcement, and the penalties that *could* result, are unlikely to deter at least some ILECs from making a “statewide commitment” and risking potential enforcement. Notably, such ILECs largely would be gambling with the house’s money, and excluding potential (unsubsidized) competition in the meantime.
- **Third**, enforcement might not be effective given evidentiary and burden-of-proof issues. It would be particularly difficult to prove that a support recipient is guilty of malfeasance as opposed to inefficiency or a flawed business plan. While holding recipients to a “strict liability” standard could force recipients to internalize the costs associated with their “statewide commitments,” it is unclear whether this approach would be consistent with the Commission’s enforcement authority, which subjects only “willful” conduct to enforcement action.⁹
- **Fourth**, the enforcement process would be subject to excessive politicization, which could preclude the Commission from effectively acting in certain cases.
- **Fifth**, the enforcement process would be ineffective against a recipient that already has squandered its support and, as such, effectively is judgment proof. In contrast, requiring an up-front surety would facilitate the Commission’s ability to recover at least a portion of the value of such support if necessary.
- **Sixth**, the enforcement process places significant burdens on the Commission, whereas the accountability measures proposed by ViaSat shift some of these burdens onto support recipients, where they belong.

Equally misguided is the suggestion that accountability measures could deter program participation by ILECs. Neither ITTA nor USTelecom quantifies the costs of compliance in any meaningful sense, or demonstrates that such costs would deter program participation meaningfully. In any event, any such costs would pale next to the competitive and financial benefits that ILECs would receive under the CAF. In light of these benefits, it is only fair and appropriate for the Commission to shift some of the burden associated with program administration onto ILECs. And, if ILECs do not wish to assume those burdens, there are plenty of competitive providers that would be willing to do so; an ILEC need only decline support.

⁹ See 47 U.S.C. §§ 501-504.

III. THE RECORD SUPPORTS THE ACCELERATION OF THE IMPLEMENTATION TIMETABLE FOR THE RAF

The *CAF Order* relieves ILECs of any obligation to serve “remote areas,” and instead relegates these households to a separate Remote Areas Fund (“RAF”).¹⁰ Although households in these areas are most in need of support, and least likely to receive broadband service absent such support, the *CAF Order* currently would not provide any support to these areas until sometime in 2013 at earliest—assuming that all relevant program rules are finalized in a timely manner.¹¹ In contrast, the CAF Order provides additional funding to price cap ILECs serving comparatively well-off areas almost immediately, beginning in early 2012.¹²

ViaSat’s Petition explained that this timetable is backwards, and that, in light of the clear priorities reflected in Section 254(b)(3), remote areas should receive funding *first*, not *last*. Thus, ViaSat requested that the Commission accelerate the timetable for the deployment of fund through the RAF. More specifically, ViaSat requested that the Commission implement an interim program to enable consumers in remote areas to obtain broadband service from a provider of their choice at a discounted rate, subject to reimbursement from the CAF to the provider in the amount of the discount.

Only USTelecom opposes this request, claiming that such acceleration would disrupt the Commission’s budget and overall plans for the CAF.¹³ By this, USTelecom clearly means that such acceleration *could* disrupt the ability of its ILEC members to receive the \$4.2 billion in support that is simply being handed to them through the general CAF. ViaSat acknowledges the possibility that there could be some short-term disruption to the

¹⁰ *CAF Order* ¶ 533.

¹¹ *Id.* at ¶ 30.

¹² *Id.* at ¶ 22.

¹³ *See* Comments of USTelecom at 11-12.

budget if the RAF timetable is accelerated. However, ViaSat has confidence in the Commission’s ability to minimize those disruptions by making appropriate adjustments quickly. In any event, ViaSat believes that any minor disruptions should be accommodated in light of the substantial offsetting benefits to consumers in remote areas.

USTelecom also claims that accelerating RAF support would not provide an “immediate boost” in the same way the CAF Phase I support would.¹⁴ The facts belie this claim. In stark contrast to ILEC broadband service—which could take years to implement—satellite broadband service would be available immediately in many remote (and adjacent) areas. The RAF would subsidize the cost of such service, allowing consumers to purchase service at lower effective rates and providing a “boost” that would be far more “immediate” than delivered through the general CAF in other areas. Moreover, households in remote areas would benefit from this “boost” more fully, given the greater difficulties of extending service to these areas absent support.

IV. THE COMMISSION SHOULD RESOLVE VIASAT’S PETITION EXPEDITIOUSLY, AND SHOULD NOT DELAY PENDING THE RESOLUTION OF JUDICIAL APPEALS

NASUCA asks that the Commission defer consideration of ViaSat’s Petition until after all judicial appeals of the CAF Order have been resolved.¹⁵ NASUCA does not provide any justification for this request, which is without foundation or justification.

As an initial matter, the resolution of judicial proceedings could take *years*. As ViaSat and the Commission have stressed throughout this proceeding, the Commission has an *immediate* policy interest in extending broadband to “unserved” areas in an expeditious and efficient manner, just as ViaSat has an *immediate* policy interest in the full

¹⁴ *Id.* at 11.

¹⁵ *See* Comments of NASUCA at 22.

consideration of its Petition. Any stay of this proceeding would undermine those interests, and harm consumers in the process.

Furthermore, the law (and logic) suggest that NASUCA's request should be rejected. Under the framework established in the Administrative Procedures Act, it is the Commission, and not the courts, that should resolve difficult questions of telecommunications policy in the first instance. Notably, the courts themselves have recognized as much by frequently deferring to the Commission's expertise and staying judicial proceeding under the primary jurisdiction doctrine. As such, the Commission should reject NASUCA's suggestion.

V. CONCLUSION

For the foregoing reasons, ViaSat respectfully requests that the Commission reconsider the fundamental approach taken in the *CAF Order*, and instead adopt a market-based approach consistent with ViaSat's previous comments in this proceeding. In addition, ViaSat reiterates its request that the Commission reconsider certain specific aspects of the *CAF Order*, and in particular that the Commission:

- (i) Reconsider its decision to categorically preclude satellite broadband providers from establishing that their services are viable competitive alternatives to incumbent offerings in a given geographic area;
- (ii) Reconsider its apparent decision not to impose strong accountability measures on ILECs prior to the distribution of any CAF support;
- (iii) Reconsider its decision to demand "reasonable comparability" of usage limits instead of reasonable comparability of broadband access in general; and
- (iv) Reconsider its decision to delay the provision of funding to "remote areas" that are most in need of CAF support.

Respectfully submitted,

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February 21, 2012

CERTIFICATE OF SERVICE

I, Jarrett S. Taubman, hereby certify that on this 21st day of February, 2012, I caused true and correct copies of the foregoing "Reply of ViaSat, Inc." to be served upon the following, via first-class mail, postage prepaid:

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